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Supreme Court, U. S.
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No. 499.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

SANDERS BROTHERS RADIO STATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR SANDERS BROTHERS RADIO STATION IN OPPOSITION.

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December 1, 1939

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OPINIONS BELOW.

The findings of fact, conclusions of law, and order of the Federal Communications Commission are not yet reported, but are found at R. 494-504. The opinion of the United States Court of Appeals for the District of Columbia (R. 572-577) is reported in 106 F. (2d) 321.

JURISDICTION.

The order of the United States Court of Appeals reversing the decision of the Federal Communications Commission was entered January 23, 1939 (R. 578). An order denying the Commission's petition for rehearing was entered August 2, 1939 (R. 578). The petition for a writ of certiorari was filed November 2, 1939. The jurisdiction of this court is invoked by the Federal Communications Commission under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the licensee of an existing broadcast station who will suffer serious and irreparable economic injury as the result of the construction and operation of a new broadcast station in the same community is a "person aggrieved or whose interests are adversely affected" within the meaning of Section 402(b)(2) of the Communications Act of 1934.

2. Whether the failure of the Commission to make a finding concerning the economic effect which the construction and operation of a new station will have upon an existing station in the same community (the issue having been properly raised before the Commission) is reversible error.

STATUTE INVOLVED.

Certain relevant sections of the Communications Act of 1934 (48 Stat. 1064) have been set out in the Petition and Appendix attached thereto (pp. 3-5, 17-27). Other pertinent sections, §§ 303(f), 312 and 405 (47 U. S. C. A. §§ 303(f); 312, and 405) are reprinted in Appendix A, *infra*, pp. 26-28.

STATEMENT.

This case commenced with the filing of an application on January 20, 1936 with the Commission for a construction permit requesting authority to construct and operate a new broadcast station at Dubuque, Iowa (R. 8-23). The appli-

cant was the Telegraph Herald, publisher of a daily newspaper in Dubuque (R. 43). The Commission was unable to determine that the granting of the application would serve public interest, convenience and necessity, and accordingly, on May 1, 1936 designated the application for hearing (R. 23-24).

Respondent has, since 1933, been the licensee of a broadcast station, WKBB at East Dubuque, Illinois, directly across the Mississippi River and part of the same inhabited community (R. 167). On May 14, 1936 respondent filed an application for authority to move the transmitter of the station into Dubuque and to install a more efficient antenna (R. 30-38, 464). On August 18, 1936 respondent requested permission to intervene in the proceedings to be held on the Telegraph Herald application, alleging, among other things:

> "There is insufficient advertising revenue available in the Dubuque area to support an additional radio outlet and the granting of the above described application [of the Telegraph Herald] would therefore seriously impair the type of service now being rendered by Station WKBB." (R. 28)

Respondent's petition for intervention was granted by the Commission September 22, 1936 (R. 29). A petition by the Telegraph Herald to intervene in the proceedings to be held in connection with respondent's application was likewise granted (R. 496).

A consolidated hearing was held before an examiner on the two applications, commencing on September 14, 1936 (R. 39). Both applicants participated fully in the proceedings. Without objection respondent introduced evidence tending to show insufficient commercial support for another broadcast station in the community and that the granting of the application of the Telegraph Herald would seriously impair the ability of respondent to continue operation of Station WKBB in the public interest. This evidence demonstrated that Station WKBB had sustained an operating

deficit of $4,165.85 for the twenty-month period prior to the hearing and that it had not made a profit since it commenced operating in 1933 (R. 191); that of the sixty merchants in Dubuque which the Telegraph Herald relied upon for commercial support of its proposed station, thirty-three had advertised over Station WKBB in the past and eighteen had purchased time on the station in the few months immediately prior to the hearing (R. 213); that from 85 to 90 per cent of the respondent's gross revenue came from Dubuque (R. 192), and that since the good service area of the proposed Telegraph Herald station would be practically the same as the area served by the respondent's station (R. 499, 503), the two stations would directly compete with each other for audience and for the advertiser's dollar. The apprehended adverse effect is readily apparent from testimony showing that the operating expenses of the Telegraph Herald station were estimated at $2,000 *per month* (R. 499) which would have to be obtained almost entirely from Dubuque merchants. Respondent also showed that the Dubuque area was served by broadcast stations located in other cities. At the time of the hearing eleven stations rendered a degree of service throughout all or a part of the area proposed to be served by the Telegraph Herald (R. 69, 439, 448).

On October 31, 1936, the examiner submitted his report recommending that the Telegraph Herald application be denied and that respondent's application be granted (R. 463-485). In recommending denial of the Telegraph Herald application the examiner concluded:

> "The applicant has failed to establish a need for additional daytime service in the area proposed to be served; nor does the applicant propose to render any new, novel or different service from that already being received in that area. The major portion of the area proposed to be served by applicant is now receiving service from an existing facility located at East Dubuque, Illinois. The city of Dubuque is receiving at both its east and west city limits a signal of two milli-

volts per meter or greater from Station WMT at Waterloo, Iowa." (R. 483)

The Telegraph Herald filed exceptions to the examiner's report (R. 486), and both parties requested oral argument before the Commission (R. 488, 489). Oral argument was held before the Broadcast Division on February 11, 1937 (R. 490).

On July 2, 1937, prior to the adoption and publication by the Commission of any findings of fact or conclusions of law, the Commission issued and publicly announced minute entry No. 540 wherein it was stated that public interest, convenience and necessity would be served by the granting of both applications (R. 492-493). On the same date the Commission entered its final order, effective July 27, 1937, granting both applications (R. 494). The "Statement of Facts and Grounds for Decision," the only document purporting to contain findings of fact sufficient to support the decision, was not adopted by the Commission until July 27, 1937, as evidenced by Minute No. 546 entered by the Commission on July 30, 1937 ratifying the order granting both applications (R. 495).

The "Statement of Facts and Grounds for Decision" gave as reasons for granting the applications (1) that both applicants were legally, technically and financially qualified to undertake the necessary construction and operation, (2) that there was a need in the Dubuque area for the services proposed, and (3) that no questions of electrical interference were involved (R. 496-504). The Commission made no finding upon the economic issue. This is conceded by the petition filed in this court (see Petition, p. 7).

Subsequent to the Commission's decision, respondent filed a petition to extend the effective date, a notice and demand that it be served with copies of reports submitted to the Commission by the Law, Engineering and Examining departments relative to the applications, and a petition for rehearing (R. 505-524). All of these petitions were denied (R. 506, 509, 569), and respondent appealed to the United

States Court of Appeals for the District of Columbia (R. 1). No appeal was taken by the Telegraph Herald from the Commission's decision granting respondent's application, and the decision of the Commission is final in this respect.

The Telegraph Herald became a party to the proceedings in the Court of Appeals through the granting of its petition to intervene (R. 4). *Both intervenor and the Commission* filed motions to dismiss the appeals on the *sole* ground that the appeal was not timely presented. At no time did either the petitioner or intervenor move to dismiss for lack of an appealable interest on the part of respondent. The printed record before this court does not disclose that the point was ever raised by either the Commission or the intervenor. In fairness to the Commission, however, it should be added that the point was raised (but for the first time) in the Commission's petition for rehearing in the court below, but the petition is not reprinted in the record. At the same time it should further be added that, in its written argument supporting and attached to the petition, the Commission stated:

> "We do not wish to minimize the importance of a consideration by the Commission of the effect of competition between a proposed new station and existing stations before the Commission grants a license for the proposed new station. Unquestionably, the Commission should, in determining whether the 'public interest, convenience and necessity' will be served by the licensing of a new station in a community, give careful and painstaking consideration to the question of whether the effect of granting the new license will be to defeat the ability of the holder of any one or more outstanding licenses to carry on in the public interest. The Commission is entirely in accord with the view that if the effect of granting a new license would be to defeat the ability of the holder of an outstanding license to carry on in the public interest, the application for the new station should be denied unless there are 'overweening reasons' of a public nature for granting it. And the Commission also believes that it is obviously a stronger case where neither licensee will be financially

able to render adequate service. It is the Commission's endeavor to determine in every case whether service to the public will be benefited or adversely affected by its action on an application."

Among the questions presented by respondent to the Court of Appeals was whether "the Commission erred in failing to make any finding with reference to the economic effect upon the appellant by the granting of the application of the Telegraph Herald" (R. 2).

On January 23, 1939, the court below reversed the Commission's decision granting the Telegraph Herald application (R. 572) and remanded the cause for further proceedings. The court held that the economic issue had been clearly presented to the Commission, and that the Commission's decision was arbitrary and capricious because of its disregard thereof and its failure to make any findings thereon (R. 572-577). The court expressly found it unnecessary to consider other questions raised by respondent.

On February 9, 1939, the Commission filed a petition for rehearing in the court below in which, as above noted, it raised for the first time the questions presented to this court by petition for writ of certiorari. The petition for rehearing was denied August 2, 1939 (R. 578).

ARGUMENT.

I.

The Respondent is a "Person Aggrieved or Whose Interests Are Adversely Affected" by a Decision of the Commission Within the Meaning of Section 402(b)(2) of the Communications Act of 1934.

Whether or not respondent had sufficient standing to appeal to the court below depends upon the language and proper interpretation of Section 402(b)(2) of the Act, providing:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the

Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) *By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.*" (Italics supplied)

A. The question whether the licensee of a broadcast station who will suffer economic injury has the right to appeal was not (as above pointed out) presented to the court below until the filing of a petition for rehearing which was denied without opinion. The Commission's petition for rehearing, in raising the point, stated:

> "The Commission did not raise either the aforementioned jurisdictional question or the question of the necessity for making findings when the Commission grants an application under Section 309(a) of the Act because neither of these points was considered to be a *sine qua non* of the Commission's case in this appeal. As to the jurisdictional question, the Commission heretofore took the position that the appellant could not sustain its allegation of economic injury through the establishment of the additional station by the intervener. * * *"

B. The question whether respondent is a "person aggrieved or whose interests are adversely affected by any decision of the Commission" within the meaning of Section 402(b)(2) is not, on the record before this court, of such a nature as to require review.

(1) No conflict of decision is involved.

(2) The decision below is not contrary to decisions of this court. The cases referred to in the Commission's petition (p. 13) (*Charles River Bridge* v. *The Warren Bridge*, 11 Pet. 420; *New Orleans, Mobile and Texas Railroad Co.* v.

Ellerman, 105 U. S. 166, 173-174; *Alabama Power Co. v. Ickes*, 302 U. S. 464, 483; and *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118) hold that one who possesses a non-exclusive franchise from a state, who engages in a business not requiring a certificate of public interest, convenience and necessity as a prerequisite to permission to carry on the business, and who is not given a statutory right of appeal has no right to object to financial loss resulting from the lawful activities or operations of a competitor. The competition was held to be *damnum absque injuria*, no legal right having been invaded or threatened. The Communications Act, on the other hand, directs the Commission to grant construction permits only "if public convenience, interest or necessity will be served by the construction of the station" (Section 319), and gives both a right to petition for rehearing and a right to appeal to persons aggrieved or whose interests are adversely affected (Sections 405 and 402(b)(2)). The right of respondent to resist being subjected to financial disaster resulting from arbitrary action of the Commission is based upon and arises from, not common law rights or remedies, but statutory authorization.

In the argument supporting its petition for rehearing filed in the court below the Commission conceded that it had a duty under the Act, in determining whether or not to grant applications for new stations, to ascertain the economic effect which the new station would have upon existing licensees in the same communities, and, if the result of the granting of an application would be to preclude the existing station from operating in the public interest, the application should be denied in the absence of compelling reasons of a public nature to the contrary (see Statement, above).

It is submitted the decision below is not contrary to decisions of this court, but rather is in strict accordance with them. The standard "public interest, convenience or necessity," used at several junctures in Title III of the

Communications Act, was obviously drawn from statutes regulating public utilities and carries, within limitations imposed by Congress and by the subject-matter of regulation, an analogous connotation. In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 385, this court held that threatened financial loss to the existing ferry company due to competition from a new ferry gave this court jurisdiction of a proceeding instituted by the existing ferry company seeking an injunction to prevent operation of the competitor's line, that the existing ferry company was a "party in interest" within the meaning of the Transportation Act and had a right to maintain its bill. The court states:

> "Considering *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204; *Colorado* v. *U. S.*, 271 U. S. 153; *Western P. Cal. R. Co.* v. *So. P. Co.*, 284 U. S. 47, and *Transit Commission* v. *U. S.*, 284 U. S. 360, it must be held that appellant is a 'party in interest' within the meaning of the statute capable of instituting the present proceedings. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

This case is particularly pertinent because Section 402(d) of the Communications Act expressly states that in connection with intervention on appeals the term "interested party" is synonymous with the term "any person who would be aggrieved or whose interest would be adversely affected."

The distinction between rights as they existed at common law and rights created by acts of Congress is recognized in *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U. S. 48. There the Western Pacific California Railroad Company brought a bill to enjoin the construction by the respondent of a line of track which would operate in competition with the railroad owned by the Western Pacific California Railroad Company. The respondent had not obtained from the Interstate Com-

merce Commission a certificate of public interest, convenience and necessity and the only question was whether or not the Western Pacific California Railroad Company was a "party in interest" within the meaning of Section 1, paragraph 20, of the Transportation Act of 1920. The opinion of the Supreme Court states as follows:

"Paragraphs 18 to 22, supra, were considered here in Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, 70 L. ed. 578, 46 S. Ct. 263, and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: 'It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See Railroad Commission v. Chicago B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 S. Ct. 232; New England Divisions Case (Akron, C. & Y. R. Co. v. United States), 261 U. S. 184, 67 L. ed. 605, 43 S. Ct. 270; Chicago Junction Case (Baltimore & O. R. Co. v. United States), 264 U. S. 258, 68 L. ed. 667, 44 S. Ct. 317; Railroad Commission v. Southern P. Co., 264 U. S. 331. The Act sought, among other things, to avert such losses.'

"The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition.

"*If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules com-*

monly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488, 67 L. ed. 1078, 1085, 43 S. Ct. 597. *It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened.* It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act." (Italics supplied)

See also *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific R. R. Co.*, 289 U. S. 76, 81-83; *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 F. 540; *Bremner* v. *Mason City & C. L. R. Co.*, 48 F. (2d) 615.

Indeed, the distinction between common law and statutory rights is clearly brought out in *Alabama Power Co.* v. *Ickes, supra*, cited by petitioner. This court stated, in distinguishing The Chicago Junction Case, 264 U. S. 258:

> "The Chicago Junction Case (Baltimore & O. R. Co. v. United States), 264 U. S. 258, is not to the contrary. There, suit was brought by certain railroad companies

to set aside an order of the Interstate Commerce Commission authorizing a competing company to acquire a terminal road. Answering the contention that complainants were without the legal interest necessary to entitle them to challenge the order, this court held that the right to sue arose in virtue of a special interest recognized by certain provisions contained in Transportation Act [February 28] 1920 [41 Stat. at L. 456, chap. 91, 49 U. S. C. A. § 71] and under § 212 of the Judicial Code, 28 U. S. C. A. § 45a, which gave any party to a proceeding before the commission the right to become a party to any suit wherein the validity of an order made in the proceeding is involved. In this view the Ellerman Case was thought to be inapplicable."

(3) Whatever may be its abstract general importance, or its importance as applied to other situations, the question as raised by the record in this case is not of sufficient importance or interest to require review by this court. It is not raised properly, clearly or in timely fashion, and the issue is confused by irreconcilable concessions or admissions by the Commission.

C. The court below correctly decided that respondent is an aggrieved person whose interests were adversely affected and had a right to appeal from the decision granting the application of the Telegraph Herald.

(1) The Court of Appeals for the District of Columbia has consistently held, commencing with *Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729, decided May 27, 1935, that an existing station complaining of economic injury comes within the group described by Section 402(b)(2). In *Intermountain Broadcasting Corp.* v. *Federal Communications Commission*, 94 F. (2d) 244, decided December 6, 1937, the court, per Groner, J., stated:

"In any case where it is shown that the effect of granting a new license will be to defeat the ability of the holder of the old license to carry on in the public interest, the application should be denied unless there are overweening reasons of a public nature for grant-

> ing it. And it is obviously a stronger case where neither licensee will be financially able to render adequate service. This, we think, is the clear intent of section 402(b)(2) of the statute, which provides for an appeal by an aggrieved person whose interests are adversely affected by a decision of the commission granting or refusing an application."

In *Pulitzer Pub. Co.* v. *Federal Communications Commission*, 94 F. (2d) 249, decided December 6, 1937, the same conclusion was affirmed. In *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 564, decided March 16, 1938, the court below reversed a decision of the Commission upon an appeal by an existing licensee whose interest was similar to that of respondent. No review of the decision was sought in this court. On January 23, 1939, the instant case was decided and on August 14, 1939, the court below, per Miller, J., decided *The Yankee Network, Inc.* v. *Federal Communications Commission*, not yet reported. That case contains a full discussion of the reasons leading the court to hold that an existing licensee alleging economic injury has the right to appeal under Section 402(b)(2).

(2) The construction of Section 402(b)(2) urged by the Commission would radically reduce the scope of the section, and, in the extreme view urged by the Commission, make it a nullity. In the normal situation, the only respects in which an existing licensee can be aggrieved by the action of the Commission in granting an application are through (1) electrical interference and (2) economic injury resulting from competition. A licensee of a station the service area of which would be reduced by electrical interference due to the granting of an application has an interest which in fact may be no greater, and is frequently less than, the interest of a licensee in protection against reduction of his audience and consequently of his revenue through an excessive amount of competition. To construe the Act so as to prohibit appeals from Commission decisions

granting applications for stations which would cause electrical interference to existing stations would be an obvious perversion of the intent of Congress and would run contrary to settled administrative and judicial construction of the Act. See *Journal Co.* v. *Federal Radio Commission*, 48 F. (2d) 461.

The court below commented upon this point in *The Yankee Network, Inc.* v. *Federal Communications Commission, supra*, as follows:

> "This becomes particularly obvious when we consider that to accept the argument of the Commission on this point would not only leave the licensee without opportunity for any relief whatever, even from action so arbitrary as to destroy it, but would deprive section 402(b)(2) of meaning and eliminate it from the Act as effectively as if it were repealed. We cannot impute to Congress an intent to produce an absurd result. 'There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience.' It would require a statute susceptible of no other possible interpretation to persuade us to adopt such a construction in the present case. In order to safeguard the great values of administrative procedure it is necessary to avoid extremes of administrative absolutism."

(3) Since the Commission conceded in the court below that it has the duty, in administering the statutory standard of "public interest, convenience and necessity," to deny applications for new stations (in the absence of overweening reasons) if the operation of such stations would destroy the ability of existing stations in the same community to carry on in the public interest, the Commission's construction of Section 402(b)(2) results in giving the Commission absolute authority to decide such questions as it pleases without review by any court. Clearly such a conclusion was not intended by Congress. Section 402(b)(2) was inserted to afford the opportunity of a review co-ex-

tensive with the issues decided by the Commission in acting upon an application.

(4) Section 405 of the Act provides:

> "After a decision, order or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however*, That in the case of a decision, order or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, *and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby.*" (Italics supplied)

Thus persons entitled to request rehearings are defined in part by words precisely the same as those defining persons entitled to appeal under Section 402(b)(2). Presumably the language is to be given the same construction in the two sections. To uphold the Commission's interpretation of Section 402(b)(2) means, therefore, that the Commission should henceforth abandon the construction of Sections 405, 309(a) and 319 which it has maintained for a number of years, during which (as in the instant case) it has recognized economic interest as entitling the licensee of an existing station to intervene and become a party in opposition to applications.

The function and purpose of petitions for rehearing has been commented upon by the court below on several occasions. In *Southland Industries, Inc.* v. *Federal Communications Commission*, not yet reported, decided June 15, 1938, the court stated:

> "We have heretofore suggested that rehearings should be availed of by aggrieved persons both for their own protection, and in order to afford opportunity to the

> Commission to correct errors or to hear newly discovered evidence before appeal. This is not and should not be an arbitrary requirement. Whether a petition for rehearing should be filed in a particular case must be decided on the merits as each case arises. However, in our view, its use as an administrative remedy should not be discouraged, but instead should be encouraged 'not to supplant, but to supplement' appellate review."

See also *Eastland Co.* v. *Federal Communications Commission*, 92 F. (2d) 467, 470, and *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282, cert. denied 59 Sup. Ct. 86.

(5) The Commission argues (p. 10) that, since under certain circumstances it can and does grant applications for new stations without a hearing, the licensees of stations affected economically have no right either to be heard or to appeal. Although Section 319 authorizes the granting of an application without a hearing in non-adversary proceedings, it does not, when reasonably interpreted in conjunction with Section 309(a), give such authority when the possibility of injury to existing licensees (whose privileges have already been determined to serve public interest, convenience or necessity) is present. The fallacy of the Commission's argument is demonstrated when we consider the situation of an existing station which will be affected by electrical interference through the granting of another application. The Commission's contention is, in effect, that the licensee of the existing station has no standing to object either before the Commission or the courts. The contrary has long been established in the court below. *Journal Co.* v. *Federal Radio Commission*, 48 F. (2d) 461. The Act provides that a license of a station cannot be revoked without notice and hearing (Section 311). The Commission cannot deny an application for renewal of license without affording the applicant a hearing (Section 309).

The Commission cannot even change the frequency, power, or hours of operation unless it does so after a public hearing (Section 303(f)). In the event of an adverse decision such parties plainly would have a right to appeal under Section 402(b) or under 402(a). The license of a station may be nullified as effectively through electrical interference or destructive competition proceeding from another station as by a formal order of revocation after administrative action. The denial of a right to a hearing in such circumstances would be a clear perversion of Congressional intention. See *The Yankee Network, Inc.* v. *Federal Communications Commission, supra.*

(6) The Commission's argument that since the doctrine of economic injury to competitors cannot be applied to amateur or police stations, it should not be applied to broadcast stations, is not persuasive. The granting of amateur and police stations is a routine matter of non-adversary character. The stations are on a noncommercial basis and economic questions do not arise. With exceptions not relevant to this discussion, *all* amateur and police station applications are granted, within the bands assigned to those services. The Commission is under no necessity of choosing among applicants and is not under a mandate "to provide a fair, efficient, and equitable distribution of radio service" among the several states and communities, as it is with respect to broadcast stations (Section 307(b) as amended June 5, 1936).

(7) The Commission's contention that if the court below is correct, it may be compelled to deny a renewal application of one station because of alleged adverse economic effect on another station in the same community, is somewhat chimeric. Many factors other than economic are involved in acting on renewal applications. The Commission is dealing with licensees, not applicants for new facilities, and, as this court said in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285, "the equities of existing stations undoubtedly demand consid-

eration." Unless strong and compelling reasons are shown which lead to a contrary result, a licensee has a continuing right to a renewal of license. *Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. (2d) 111, 113. "Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons." *Journal Co.* v. *Federal Radio Commission, supra*, at p. 463. "It is equally apparent that the granting of a license by the Commission creates a highly valuable property right, which, while limited in character, nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted. As it is the purpose of the Act to secure the use of the channels of radio communication by private licensees under a competitive system, those licensees must be protected in that use, not merely from unlicensed stations and unlicensed operators, but from improper activities of licensed stations and operators and from arbitrary action by the Commission, itself, in the exercise of its regulatory power." *The Yankee Network, Inc.* v. *Federal Communications Commission, supra.* Although the Commission has recognized the economic issue for years in dealing with new applications, it has not yet found it necessary to apply the principle to renewal applications.

(8) The Commission argues that a construction of Section 402(b)(2) which permits the licensee of an existing station alleging destructive competition to appeal from a decision granting an application for a new station runs counter to Section 313 of the Act against monopolies. The Commission overlooks the fact that its theory would tend to foster rather than curtail the existence of monopolies. The language of the court in *The Yankee Network, Inc.* v. *Federal Communications Commission, supra,* is a direct answer to the Commission's contention:

"The method of uncontrolled competition argued for by the Commission in the present case is in fact one way of creating monopolies. If it were allowed to go on unrestrained, according to its theory of non-reviewable arbitrary power, none but a financial monopoly could safely exist and operate in the radio broadcasting field. The Commission justifies its action in the present case, and justifies its contention in theory, by assuming that if a chain, operating several broadcasting stations, or a company which owns both newspapers and broadcasting stations, is able to carry one of them financially, even though the latter station is not able to support itself, then the latter cannot protest against destructive competition. The result of this policy might well be to destroy or frighten from the radio broadcasting industry, any independent station attempting to operate on its own resources; and to leave in the field only monopolies which were sufficiently supported financially to withstand the destructive competition which might result from arbitrary, careless action upon the part of the Commission in the granting of new station licenses. It was undoubtedly with just such considerations of possible arbitrary administrative action in mind that Congress provided for judicial review under the Communications Act on behalf of any person aggrieved or whose interests are adversely affected; as it likewise did under the Transportation Act. In each instance the remedy is statutory in character, and in each instance designed to protect rights and equities also deriving from statutes in derogation of the common law."

(9) The Commission relies upon the administrative construction of the statute in support of its position. The administrative construction of the Act is directly contrary to the theory urged in the petition. Almost without exception, licensees alleging economic conflict have been permitted to participate fully in the proceedings before the Commission. Either the Commission itself has made them respondents or, upon request, has granted intervention. The economic issue has frequently, either expressly or by neces-

sary implication, been inserted in notices of hearing. On occasions, adverse economic effect upon existing stations has been given as a reason for denial of an application. In the *Fall River Herald News Publishing Company Case*, 5 F. C. C. 377, 382, a ground for denial was stated as follows:

> "The record does not show that sufficient commercial support could be reasonably expected to enable the existing station to continue its operations and at the same time to sustain the applicant in its proposed operations."

In the *R. R. Jackman Case*, 5 F. C. C. 496, 500, involving the question of transfer of control, one ground for denial was stated as follows:

> "Station WREN, Station WDAF, and Station KMBC, which serve substantially the same area, now compete on equal terms, each having the same day and night power. If the transfer were to be approved by the Commission, Stations WREN and WDAF would be owned and controlled by the same interests and would compete with Station KMBC, thus creating a situation in the service area of these stations in which, instead of three equally powerful mutually competitive stations, there would be one station having as a competitor the owner and operator of two equally powerful stations. This would obviously place Station KMBC at a serious competitive disadvantage as well as materially reduce competition in the area."

See also *In the Matter of Genesee Radio Corporation*, 5 F. C. C. 183, 186; *In the Matter of The Louisville Times Company*, 5 F. C. C. 554, 559.

Appendix B contains a list of cases where the Commission, in disposing of applications, has considered the issue of economic effect upon existing stations. Typical instances of this are the *Irvin Case*, Docket 4686, decided November 1, 1938, where it was stated:

> "As it affirmatively appears that Station KGNC is operating at a substantial profit and the merchants who have indicated their intention of using the facilities of either of the proposed stations are in the main merchants who do not now use the facilities of Station KGNC, it is apparent that the operation of a local broadcast station would not result in a loss of a substantial amount of the advertising support of Station KGNC and would not adversely affect the ability of this station to render adequate broadcast service in this area."

In the *WLBG Case*, Docket 4681, decided March 20, 1939, the Commission stated:

> "From a consideration of all of the above evidence, the Commission is not convinced that this intervener has shown that Station WRTD will be deprived of any revenue from the proposed operation much less to a point to impair its ability to operate in the public interest. * * * It is seen from the foregoing that the intervener has made no showing, which is entitled to serious consideration, that its finances will be adversely affected through the proposed operation."

Appendix B also contains a list of cases where the Commission considered the question, in passing upon applications for new or better facilities in communities already having stations, whether or not there was adequate commercial support.

It is respectfully submitted that respondent is a "person aggrieved or whose interests are adversely affected" within the meaning of Section 402(b)(2) of the Act.

II.

The Failure of the Commission to Make a Finding of the Economic Effect Which the Granting of the Application of the Telegraph Herald Would Have Upon the Respondent's Station Was Arbitrary and Capricious and Constituted Reversible Error.

The position of the Commission in the court below was that it made all the findings required by law to sustain its action and that, since respondent had not demonstrated it would be economically injured by the operation of the proposed Telegraph Herald station, the Commission was not required to make a finding upon that subject. For the first time in the Commission's petition for rehearing and now again in this court, the Commission urges that it is not required to make any findings of fact when it grants an application. The argument that no findings of any character are required comes too late. This court will not review questions which are not shown by the record to have been raised in the court below or presented in a timely manner. *Duignan* v. *United States*, 274 U. S. 195; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415; *Minnich* v. *Gardner*, 292 U. S. 48.

Even if the question were properly before this court for review, certiorari should be denied because the contention is without merit. Administrative bodies are required to make findings of fact when acting in a quasi-judicial capacity. *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454; *State of Florida* v. *United States*, 282 U. S. 194; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499; *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Mahler* v. *Eby*, 264 U. S. 32; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554; *Missouri Broadcasting Corp.* v. *Federal Communications Commission*, 94 F. (2d) 623, cert. denied, 303 U. S. 655; *Tri-State Broadcasting Co., Inc.* v. *Federal Communications*

Commission, 96 F. (2d) 564; *The Yankee Network, Inc.* v. *Federal Communications Commission, supra; Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission*, not yet reported, decided November 13, 1939. This court stated in *Beaumont, S. L. & W. R. Co.* v. *United States, supra:*

> "Complete statements by the Commission showing the grounds upon which its determination rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this."

Not only the necessity of findings but the manner of making them was referred to by this court in *United States* v. *Chicago, M., St. P. & P. R. Co., supra*, as follows:

> "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency."

Section 402(e) of the Act makes findings of fact, if supported by substantial evidence, conclusive upon the parties. Section 402(e) requires the Commission to file in the Court of Appeals for the District of Columbia within thirty days after the taking of an appeal copies of all papers and evidence presented to the court, and, within thirty days thereafter, to file a full statement in writing of the facts and grounds for its decision as *found* and given by it. It is plain that the duty of making findings of fact in adversary or contested proceedings was imposed upon the Commission by the Act.

It seems hardly necessary to argue that the Commission erred in failing to make a finding, one way or the other, concerning the economic effect of the proposed Telegraph Herald station upon respondent. The statutory standard

of public interest, convenience and necessity involves the making of such a determination, as the Commission has conceded. The *Yankee Network, Inc.* v. *Federal Communications Commission, supra.* Speaking of the necessity of making a finding upon the availability of commercial support, the Court of Appeals stated:

> "Even though there may be evidence in the record—upon this we do not pass—from which the Commission may have concluded that the intervenors would receive adequate commercial support * * *, this does not excuse the Commission from its duty of making a finding as the result of its consideration of that evidence." *Saginaw Broadcasting Co.* v. *Federal Communications Commission, supra,* at p. 563.

A mere finding by the Commission that the public interest, convenience and necessity will be served by its action is not sufficient under the Act in adversary proceedings. *Saginaw Broadcasting Co.* v. *Federal Communications Commission, supra; Missouri Broadcasting Corp.* v. *Federal Communications Commission, supra.*

CONCLUSION.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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December 1, 1939

APPENDIX A.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with:

Sec. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of

said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceed-

ings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing or modifying the original determination, shall be subject to the same provisions as an original order.

APPENDIX B.

Cases Where the Commission, in Disposing of Applications, Has Considered the Issue of Economic Effect Upon Existing Stations.

In re Applications of Red Oak Radio Corp. (KICK), Carter Lake, Iowa, and The Palmer School of Chiropractic (KICK), Davenport, Iowa, 1 F. C. C. 163, 164, 165.

In re application of Red River Broadcasting Co., Inc. (KGFK), Moorhead, Minnesota, 1 F. C. C. 215, 216.

In the Matter of Wichita Falls Broadcasting Co. (KGKO), Wichita Falls, Texas, 3 F. C. C. 386, 393.

In the Matter of Dorrance D. Roderick, El Paso, Texas, 3 F. C. C. 616, 622.

In the Matter of Gulf Coast Broadcasting Co., Corpus Christi, Texas, 4 F. C. C. 103, 106.

In the Matter of Beaumont Broadcasting Association, Beaumont, Texas, 5 F. C. C. 139, 142.

In the Matter of Genesee Radio Corp., Flint, Michigan, 5 F. C. C. 183, 186.

In the Matter of Standard Life Insurance Company of the South, Jackson, Mississippi, 5 F. C. C. 349, 352.

In the Matter of Fall River Herald News Publishing Company, Fall River, Massachusetts, 5 F. C. C. 377, 382.

In the Matter of The Northern Corporation (WMEX), Boston, Massachusetts, 5 F. C. C. 468, 471-472.

In the Matter of R. R. Jackman, et al. (WREN), Lawrence, Kansas, 5 F. C. C. 496, 500.

In the Matter of The Louisville Times Company, Louisville, Kentucky, 5 F. C. C. 554, 559.

In the Matter of Dorrance D. Roderick, El Paso, Texas, 5 F. C. C. 563, 569.

In the Matter of John S. Allen and G. W. Covington, Jr., Montgomery, Alabama, 5 F. C. C. 631, 635-636.

In the Matter of KQV Broadcasting Co. (KQV), Pittsburgh, Pennsylvania, 5 F. C. C. 584, 593.

In the Matter of The Metropolis Company, Jacksonville, Florida, decided October 25, 1938.

In the Matter of Voice of Longview (KFRO), Longview, Texas, decided May 31, 1939.

In re Application of Civic Broadcasting Corp., Syracuse, New York, decided October 5, 1939.

Cases Where the Commission Considered the Question of the Adequacy of Commercial Support in Passing Upon Applications for New or Better Facilities in Communities Already Having Stations.

In the Matter of Quincy A. Brackett Lewis B. Breed, and Edmund A. LaPort, d/b as Connecticut Valley Broadcasting Company, Springfield, Massachusetts, 2 F. C. C. 326, 328.

In the Matter of William A. Schall, Omaha, Nebraska, 2 F. C. C. 360, 364.

In the Matter of Edward Hoffman, St. Paul, Minnesota, 2 F. C. C. 394.

In the Matter of Eugene DeBogory & Mildred English, d/b as Dallas Broadcasting Company, Dallas, Texas, 2 F. C. C. 402, 409.

In the Matter of W. R. Cramer & G. A. Anderson, trading as Omaha Broadcasting Company, Omaha, Nebraska, 2 F. C. C. 418, 420.

In the Matter of G. D. Goff, Tampa, Florida, 2 F. C. C. 585, 587.

In the Matter of F. W. Atkinson, Watsonville, California, 3 F. C. C. 137, 140, 141.

In the Matter of Union Tribune Publishing Company, San Diego, California, 3 F. C. C. 451, 452, 453.

In the Matter of WLBG, Incorporated (WPHR), Petersburg, Virginia, 3 F. C. C. 666, 671, 672.

In the Matter of Continental Radio Company, Toledo, Ohio, 4 F. C. C. 422, 426.

In the Matter of William F. Maag, Jr., Youngstown, Ohio, 5 F. C. C. 324, 326.

In the Matter of Juan Piza, San Juan, Puerto Rico, 5 F. C. C. 327, 330.

In the Matter of Standard Life Insurance Company of the South, Jackson, Mississippi, 5 F. C. C. 349, 352.

In the Matter of Arthur Lucas, Savannah, Georgia, 5 F. C. C. 464, 467.

In the Matter of Press-Union Publishing Company, Atlantic City, New Jersey, decided March 6, 1939.

In the Matter of Kentucky Broadcasting Corporation, Louisville, Kentucky, decided February 6, 1939.

In the Matter of M. C. Reese, Phoenix, Arizona, decided November 29, 1939.